82-1616

No. ....

IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JACQUES E. SOIRET,
MARSHALL SILBERBERG,
ROBERT M. CHURELLA,
KIRTLAND & PACKARD,
626 Wilshire Boulevard,
Los Angeles, Calif. 90017,
(213) 624-0931,
Attorneys for Plaintiff-Respondent Weber Aircraft Corporation.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

Constitution

Page

Statutes and Regulations

No. ....

IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

WEBER AIRCRAFT CORPORATION, *et al.*

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF FACTS

On October 9, 1973, CAPTAIN RICHARD HOOVER, USAF (hereinafter HOOVER), ejected from a disabled aircraft. As a result of injuries he received upon his impact with the ground, he was rendered a paraplegic.

HOOVER subsequently filed suit, alleging that his injuries were the result of defects in his parachute assembly. WEBER AIRCRAFT CORPORATION (hereinafter WEBER) is one of six defendants in that action from whom HOOVER seeks over $5,000,000.

WEBER requested that the Air Force produce statements made by HOOVER and Airman DICKSON to the Air Force Accident Investigation Board during its investigation of the accident, and the Air Force refused to produce them, claim-

ing they were exempt pursuant to Exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552(b)(5) (hereinafter FOIA).

As these statements are essential to its defense, for reasons which are set forth below, WEBER filed suit seeking to compel their production. In an unreported decision, the District Court granted summary judgment to the U.S. WEBER appealed, and the Ninth Circuit reversed. *Weber Aircraft Corp. v. United States*, 688 F.2d 638 (9th Cir. 1982) WEBER believes the Ninth Circuit decision to be proper, and opposes the petition for the reasons set forth below.

FACTUAL BACKGROUND.

WEBER seeks statements made by HOOVER to the President of the Air Force Accident Investigation Board, wherein HOOVER stated unequivocally that he had impacted the ground, landing on his undeployed seat kit. WEBER also seeks the production of the statement of Airman DICKSON, relating to what he did or failed to do during the course of rigging HOOVER's equipment, including the survival kit and automatic deployment assembly which failed to deploy.

As a result of the investigation by the Air Force, it was concluded that the competent producing cause of the injury to HOOVER's vertebra and the related injuries was the failure of the seat survival kit to automatically deploy. R. 113-115. The failure of the seat kit to automatically deploy prevented HOOVER from executing the prescribed parachute landing fall maneuver (hereinafter PLF), causing him to land on the undeployed survival kit that was attached to his pack and harness assembly, in the region of his buttocks and lower extremities.

A. The Conflicting Testimony: HOOVER.

HOOVER testified before the Collateral Investigating Board (the report of which was voluntarily released to all parties) that he landed on his feet first, and attempted to

execute a PLF and roll. R. 143. He also stated that he was hoping that the survival kit would release and deploy as programmed, but it did not. It is significant that he insisted there that he landed on his feet and attempted to roll to the right. During the course of his deposition testimony given in the related litigation, HOOVER said that he was concerned about making a good PLF; that he covered his face, tucked his arms in, and assumed a PLF position; and that the instant his feet touched the ground, he made a PLF to the right.

However, in a statement made to Colonel Rogers, the President of the Accident Investigation Board, HOOVER said that he raised his knees in a crouch and hit on the survival kit which had failed to automatically deploy.

B. The Conflicting Testimony: DICKSON.

Airman DICKSON was the parachute rigger who worked on HOOVER's pack and harness assembly when it was last modified prior to HOOVER's utilizing the equipment on October 9, 1973. At that time he was required to disassemble, and thereafter reassemble, the "upper disconnect assembly", which was coincidentally required to be attached to the very speed connector link missing from HOOVER's pack on October 9, 1973. The modification procedure in which Airman DICKSON was involved also required the installation and actuation of what is known as the "lower disconnect assembly". That assembly provided for the automatic deploy of the seat survival kit away from the pilot's body during descent and contact with the ground. It did not function.

During the course of his deposition testimony in the related litigation, Airman DICKSON testified that he had never at any time laid his hands upon or touched or worked with the speed connector link. R. 169-172. There is evi-

dence, however, that he signed the Air Force forms indicating that he had in fact made the "upper disconnect assembly" modification. That involved taking apart the speed connector link associated with the right rear riser and, thereafter, putting it back together again (if done properly). R. 168. Regarding the "lower disconnect assembly", Airman DICKSON testified that he never performed any part of that modification, and that it was in fact accomplished in a so-called assembly line approach. R. 169-172. His superior, during his deposition, denied that.

A substantial portion of the "upper disconnect assembly" was not found. The right rear speed connector link was not found. Minute examination of the related harness and pack assembly revealed no evidence of separation of the link from the webbing during ejection sequence. There is, therefore, a substantial question as to whether Airman DICKSON replaced the right rear speed connector link or, if he replaced it, whether he replaced it properly. Appellants submit that Airman DICKSON may have confessed that he failed to replace the link or otherwise failed to accomplish the procedure. The fact that he testified in his deposition that he never touched these links is supportive of this assumption at this time, as is the fact that after this accident he was relieved of all duties involving parachute rigging.

Further, evidence supplied by government counsel disclosed the existence of five cases involving admissions by unidentified maintenance personnel of improper acts that resulted in major accidents during the period 1971-1973. Airman DICKSON gave a statement to the Accident Investigation Board.

A critical document testified to by Captain Diggs, Mr. Findley, and Major Harrison (all of whom were and are experts in life support equipment) reveals *the Air Force conclusion* that the connector link was missing *prior* to pack

opening; or, the connector link was not properly locked during accomplishment of a modification during the pack and harness maintenance by Airman DICKSON that last preceded HOOVER's use of the equipment on October 9, 1973. R. 113-115.

Airman DICKSON's evidence given to the Accident Investigation Board, then, is critical to the issue of his credibility, and it is critical to the final determination of the single most critical fact issue in the underlying litigation. The government refuses to produce it.

There is, thus, substantial evidence that HOOVER and DICKSON testified differently to the Accident Investigation Board than they did either in their depositions or before the Collateral Investigating Board. The concealment of the HOOVER and DICKSON statements is what the UNITED STATES petitions this Court to order.

REASONS FOR DENYING THE PETITION.

WEBER submits that the petition should be denied for the following reasons:

I.

THE PETITION PRESENTS NO JUSTICIABLE CONTROVERSY.

A. Petitioner Cannot Show That the Statements Were in Fact Given Pursuant to Any Promise of Confidentiality.

The government's entire petition is based on the allegation that the HOOVER and DICKSON statements were given in response to a promise of confidentiality. The record below amply shows that no such promise can be proved to have been given.

In its motion for summary judgment, the UNITED STATES contended that the Accident Investigation Board's investigation of this accident had been conducted pursuant to Air Force regulation AFR 127-4, *dated October 24, 1975*, and the court so found. (Petition, p. 22a, Finding 1).

After it was noted during oral argument before the Ninth Circuit that this regulation *postdated* the accident, and the Board, by nearly two years, the Court invited the government to submit a supplemental brief on that issue, *including a reference "to parts of the record, if any, indicating whether promises of confidentiality were made to the witnesses whose statements are sought"* (App. A, *infra*).

The government did submit a supplemental brief (App. B, *infra*), *but was unable to identify a single piece of evidence in the record to substantiate its claim that promises of confidentiality had in fact been made*. Instead, it referred for the first time to AFR 127-4, *dated January 1, 1973*, which it now contends in its petition is the correct regulation, and further attempted to establish a general custom and

practice of such assurances being given.

The government attached a portion of AFR 127-4 dated January 1, 1973, to its petition (App. E). It did not advise this Court of the portions of that regulation which disclose what a witness is to be told before he gives a statement. Those portions provide *only* that:

> "Witnesses will be advised before they testify that the sole purpose of the investigation is to determine all factors relating to the accident/incident and in the interest of accident prevention, to preclude recurrence."

(App. C, *infra*, at para. 12(c)). Thus, in the regulations that the government now claims applied, there is nothing which requires, or even suggests, that a witness be promised that his testimony will be confidential.

As the government has been unable to produce a scintilla of evidence that HOOVER or DICKSON were promised that their statements would be confidential, the issue as defined in the petition does not arise under the facts before the Court.

B. Assuming a Promise of Confidentiality Was Given, It Was Waived by Disclosure of the Documents to the Parties in the Underlying Litigation.

On June 9, 1976, the deposition of John F. Findley, an employee of the United States Air Force, was taken at Kelly Air Force Base, Texas. Pursuant to valid subpoena, Mr. Findley produced a number of documents, which were examined by all counsel present. Those documents contained *verbatim* excerpts from HOOVER's statement, and the conclusion of the Air Force that HOOVER's injuries were caused by *Air Force personnel error* (by implication, the error of DICKSON, the only person to work on the assembly). After HOOVER's counsel had reviewed the documents and apparently realized their devastating impact on HOOVER's

case. HOOVER's counsel "reminded" the Air Force of the alleged confidentiality of those documents. It was only then that the Air Force first asserted the alleged confidentiality of the documents, and confiscated them from the court reporter.

Although the government subsequently asserted that Mr. Findley was not authorized to release the documents, they were released and reviewed by all counsel. Continued protection of these documents will result only in their being hidden from the jury.

C. Assuming a Promise of Confidentiality Was Given to HOOVER, It Was Waived by Him When He Instituted the Underlying Civil Litigation.

When, as here, a member of the Air Force initiates civil litigation to recover damages from manufacturers, it is reasonable to conclude that he thereby vitiates any promise of confidentiality given him by the Air Force as to the statements of facts within his personal knowledge made to the Air Force concerning the incident in which he was injured.

It would further appear that when, as here, the plaintiff in the underlying litigation takes the deposition of a member of the Air Force Accident Investigation Board and elicits testimony favorable to himself based on facts learned by the deponent in his capacity as a member of that Board, the taking of the deposition vitiates any promise of confidentiality that may have been made by the Air Force with respect to the subject matter and as to any and all portions of the investigative materials considered by the Board. To conclude otherwise would permit the deponent to testify favorably on behalf of plaintiff in the underlying litigation and would deny defendants in the underlying litigation the opportunity to impeach that testimony or otherwise attack

the credibility of the witness and the probative value of his testimony through the use of other facts disclosed in the investigation but not disclosed to the defendants.

II.

THE ALLEGED INJURY TO THE GOVERNMENT'S ABILITY TO INVESTIGATE ACCIDENTS IS NOT SUPPORTED BY THE RECORD.

The government alleges that release of the HOOVER and DICKSON statements will seriously impair the ability of the military services to gather information needed to prevent aircraft accidents. Petition, p. 8. In support of this allegation, the government below offered the Affidavit of Maj. Gen. Russell, quoted from in the Petition at p. 5. However, nowhere below did the government introduce any factual support for its conclusory and self-serving argument, a fact which was noted by the Court of Appeals:

> The government has offered no record support for its conclusory argument that shielding the witness statements at issue would "safeguard the lives of flight crews, enhance the safety of those upon whom aircraft might otherwise fall, and contribute to the national defense."

Weber, supra, at 646 fn. 12.

WEBER would also note that the argument asserted by the government is inconsistent with its practice in its identical duty to investigate *civilian* aircraft accidents. The National Transportation Safety Board (NTSB) is required to "[i]nvestigate such accidents and report the facts, conditions, and circumstances relating to each accident and the probable cause thereof". 49 U.S.C. § 1441(a)(2). The NTSB regulations, 49 CFR § 800, *et seq.*, authorize Board representatives to "interrogate any person having knowledge relevant to an aircraft accident," 49 CFR § 831.8, but contain no provision authorizing any promise of confiden-

tiality, let alone a blanket promise such as the government urges is necessary here. On the contrary, the regulations require the disclosure of all information unless the Board expressly orders the information withheld, 49 CFR §§ 801, 831.5, 845.50, and witness statements are routinely released. WEBER is unable to understand what is so different about military aircraft accidents or military witnesses that a blanket promise of confidentiality is required for them when it is not required in similar civilian accidents.

WEBER thus urges this Court to deny the petition, as the alleged injury to the government is not supported by the record and, in any event, is highly suspect.

III.
THE ISSUE OF LAW PRESENTED BY THE PETITION HAS PREVIOUSLY BEEN RESOLVED BY THIS COURT.

In its petition, the government states that the question presented to this Court is "whether confidential statements made by witnesses in an Air Force crash safety investigation are protected from disclosure under Exemption 5 of the Freedom of Information Act." It then alleges that the decision below is in conflict with the decisions in *Cooper v. Dep't. of the Navy*, 558 F.2d 274 (5th Cir. 1977), *modified on other grounds*, 594 F.2d 484 (5th Cir. 1979), *cert. denied*, 444 U.S. 926 (1979), and *Brockway v. Dep't. of the Air Force*, 518 F.2d 1184 (9th Cir. 1975).

WEBER asserts that the statutory issue presented was resolved by this Court in *FOMC v. Merrill*, 443 U.S. 340 (1979). Both *Cooper* and *Brockway* were decided before *Merrill*, and to the extent they are inconsistent with *Merrill* are no longer good law. The issue presented here is the application of *Merrill* to a particular factual situation, and is one of first impression among the Circuits.

A. Merrill Prohibits the Withholding of Information on a Public Interest Standard.

The government alleges that the decision below will severely prejudice the public interest by somehow impeding its ability to investigate military accidents. This argument was expressly rejected by this Court in *Merrill*.

In *Merrill*, the FOMC argued that release of the information sought would not be in the public interest and could impede the efficiency of its operations. This Court stated:

> Such an interpretation of Exemption 5 would appear to allow an agency to withhold any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or otherwise would not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to *Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest" standard.*

Id., at 354 [emphasis added].

The government's public safety argument is thus expressly barred by *Merrill*, and does not justify review by this Court.

B. Merrill Prohibits the Withholding of Information Pursuant to an Alleged Civil Discovery Privilege Not Recognized by the Congress.

The government's second allegation is that release of the requested statements is contrary to a civil discovery privilege recognized in *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963). The issue of the interplay between civil discovery privileges and Exemption

5 was also ruled on in *Merrill*.

The FOMC urged this Court to find that all civil discovery privileges were incorporated into Exemption 5. In response, this Court stated:

> [W]e note that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery. . . .
>
> Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and death with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.

Id., at 355.

After recognizing that this Court had previously recognized only two civil discovery privileges in Exemption 5, both "expressly mentioned in the legislative history of that Exemption", *id.* at 355, this Court examined the legislative history of Exemption 5 and found significant evidence that the Congress had intended to recognize a *limited* exemption for confidential *commercial* information:

> [W]e think that the House Report, when read in conjunction with the hearings conducted by the relevant House and Senate Committees, can fairly be read as authorizing at least a limited form of Exemption 5 protection for "confidential . . . commercial information."

Id., at 357; and:

> [W]e think it is reasonable to infer that the House Report, in referring to "information . . . generated [in] the process of awarding a contract," *specifically contemplated* a limited privilege for confidential commercial information pertaining to such contracts.

Id., at 359 [emphasis added].

This Court has thus recognized Exemption 5 as incorporating only those civil discovery privileges that were specifically contemplated by the Congress.

As the government candidly admits in its petition, "the privilege here in question . . . is not mentioned in the legislative history." Petition, p. 16. Thus, there can be no argument that the Congress specifically intended the *Machin* exemption to fall within Exemption 5, and *Merrill* thus compels a rejection of the government's reliance on the *Machin* privilege.

C. Merrill Implicitly Overruled the Machin Privilege.

WEBER would draw this Court's attention to the fact that the government's reliance on the *Machin* privilege in effect constitutes an attempt to bootstrap itself around FOIA and the holding of *Merrill*.

Machin was decided in 1963, long prior to the enactment of FOIA. The court stated its reasons for creating the privilege as follows:

> We agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the *efficient operation of an important Government program and perhaps* even, as the Secretary here claims, *impair the national security* by weakening a branch of the military, the reports should be considered privileged.

Id., at 339 [emphasis added].

As was discussed above, *Merrill* explicitly held that efficiency of government operations and public interest were *not* grounds for non-disclosure under Exemption 5, citing "Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague 'public interest' standard", *id.*

at 354. Thus, this Court has held that Congress explicitly rejected the rationale of *Machin* in its enactment of FOIA and, by implication, that *Machin* is no longer good law.

Rather than admit that the *Machin* privilege is dead, the government now petitions this Court to resurrect it by finding that Congress, when it enacted Exemption 5, specifically intended, without saying so, to preserve a privilege which is based on a rationale it expressly rejected.

D. The Holdings of Cooper and Brockway Are Inconsistent With Merrill.

Both *Cooper, supra*, and *Brockway, supra*, were decided prior to this Court's decision in *Merrill*. Both cases relied heavily on the government's argument that the efficiency of its investigations would be hampered and safety endangered, and on the *Machin* privilege.

In *Brockway*, the court stated:

> If the statements are disclosed . . . there is the definite possibility that the deliberative processes of the Air Force will be hampered and the efficiency of a specific administrative program reduced.
>
> . . . [W]e hold that on the narrow facts presented here, . . . common sense as reflected in the general law of discovery, *see, e.g., Machin v. Zuckert, supra*, indicates disclosure of these statements would defeat rather than further the purposes of the FOIA and is not required by the language of the FOIA itself.

Id., at 1194.

And in *Cooper*, after favorably citing both *Machin* and *Brockway*, the court stated:

> As to the AAR, then, we find reason in the Navy's arguments that breaching its confidentiality would destroy or greatly diminish a highly effective safety program which has saved numerous lives and much

> government property. We are not disposed nor does the FOIA require that we decree such consequences in the name of appellant's convenience.

Id., at 278-79.

Both courts thus based their holdings on the efficiency and public interest grounds explicitly rejected by *Merrill*, and on the *Machin* privilege, itself based on those same rejected grounds.

Thus, although the government is correct that the *Cooper* and *Brockway* decisions are inconsistent with the decision below, that inconsistency is not grounds for review by this Court, as the *Cooper* and *Brockway* decisions do not reflect the current law as set forth by this Court in *Merrill*.

IV.

THE COURT OF APPEALS CORRECTLY DECIDED THE ISSUE BEFORE IT.

A. The Court of Appeals Correctly Applied Merrill to the Facts of This Case.

In its petition, the government attaches great significance to an alleged misinterpretation of *Merrill* by the Ninth Circuit. WEBER urges that the government's argument is based on semantics, not reality.

In its opinion, the court stated, "As we read *Merrill*, this finding is the linchpin of the Court's analysis: Exemption 5 embraces only those civil discovery privileges *explicitly recognized* in the legislative history." *Weber, supra*, at 642 [emphasis added]. The government contends that the court erred by using the term "*explicitly recognized*", rather than the words "*specifically contemplated*" used by this Court in *Merrill, supra*, at 359.

In making this argument, the government ignores the fact that the "finding" referred to was this Court's determination that Congress "*specifically contemplated* a limited privilege

for confidential commercial information", *Merrill, supra*, at 359, quoted in *Weber, supra*, at 642 in the sentence immediately preceding the holding with which the government takes issue. Also ignored is the subsequent sentence: "Justice Stevens, in dissent, stated without rebuttal that the Court 'proposes . . . that only those privileges that are recognized in the legislative history of FOIA should be incorporated in the Exemption." *Weber, supra*, at 642.

The court clearly understood what *Merrill* requires, as it subsequently stated:

> The critical step in the *Merrill* analysis involves a search of the FOIA legislative history for evidence that Congress intended Exemption 5 to incorporate an executive privilege for "official government information." Our search convinces us that neither House of Congress intended Exemption 5 to incorporate an executive privilege that protects purely factual material. Indeed, the Senate Report assumes that Exemption 5 would protect only "legal or policy matters." S. Rep. No. 183, 89th Cong., 1st Sess. 9 (1965). Moreover, the legislative history suggests that Congress intended Exemption 5 to encompass factual material which is "inextricably intertwined" with legal or policy matters, but not to protect "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context." *EPA v. Mink*, 410 U.S. 73, 87-88, 93 S. Ct. 827, 836, 35 L. Ed. 2d 119 (1973).

Weber, supra, at 642-43.

As this passage indicates, an examination of the legislative history for Congressional intent, which is what *Merrill* requires, is what was performed.

It is also clear that the results of this examination are not in error, for, as the government states in its petition, at p. 16, "[T]he privilege in question here . . . is not mentioned in the legislative history."

B. The Court of Appeals Refused to Adopt an Interpretation of Exemption 5 That Would Condone Perjury.

The Fourth Amendment to the United States Constitution provides every citizen with the privilege that he will not be subjected to unreasonable searches and seizures, and it can be argued that this is an absolute privilege, guaranteed by our very Bill of Rights.

This Court, in *United States v. Havens*, 446 U.S. 620 (1980), held that this privilege, provided by the Fourth Amendment, is not above the law, and, in fact, evidence secured in violation of the Fourth Amendment and suppressed during the course of a trial may be used for the purposes of impeachment.

This Court stressed the importance of arriving at the truth, as well as the defendant's obligation to speak the truth. The Court rejected the notion that the defendant's constitutional shield, *i.e.*, privilege against having illegally-seized evidence used against him, could be "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances". This Court held, "There is no gainsaying that arriving at the truth is a fundamental goal of our legal system." *Havens, supra*, at 626.

This Court said that it is essential to the proper functioning of the adversary system that when a party takes the stand, the adversary be permitted proper and effective cross-examination in an effort to elicit the truth. A party's obligation to testify truthfully is fully binding on him when he is cross-examined, and the privilege against self-incrimination does not shield a party from proper questioning. Therefore, this Court held that the absolute privilege set forth in the Fourth Amendment is not above the law, the

law being that a party has an obligation to tell the truth, and if that party deviates from the obligation, any and all evidence that might otherwise be privileged is thereafter admissible for the purposes of impeachment.

As was set forth above, the documents which were produced during the Findley deposition clearly disclose the substantial probability that the HOOVER and DICKSON statements will disclose that their subsequent testimony was false. By its petition, the government urges this Court to find that Exemption 5 confers a greater privilege than the Fourth Amendment, a position properly rejected below.

C. The Decision Below Will Lead to More Just and Equitable Decisions in Actions Arising From Military Aircraft Accidents.

The decision below allows access by the parties to litigation arising from military aircraft accidents to what is argued by the government to be the most reliable information available as to the circumstances surrounding those accidents. It clearly promotes the "arriving at the truth [which] is a fundamental goal of our legal system", *Havens, supra*, at 626. It will also prevent serious inequities to the parties.

In *Lockheed v. U.S.*, ... U.S. ...., 103 S. Ct. 1033 (1983), this Court allowed third-party indemnity claims against the government arising from the death of or injury to civilian government employees in military aircraft accidents. The decision below will prevent the great inequity which would exist if the government was allowed to suppress, in a lawsuit against it, that which it here argues to be its most reliable evidence about the accident.

And, in *McKay v. Rockwell International Corp.*, ... F.2d .... (No. 81-5540, 9th Cir., Apr. 20, 1983), the Ninth Circuit, in another case arising from a military ejection mishap, stated:

> [W]e hold that under the *Feres-Stencel* doctrine and the government contractor rule, a supplier of military equipment is not subject to section 402A liability for a design defect where: (1) the United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

(Slip opinion, p. 12).

McKay imposed on the contractor the burden of proof as to the four requirements (Slip opinion at p. 18).

The decision below will prevent the grave inequity which would result from the government depriving a contractor of a *McKay* defense by refusing to release its best evidence, as can be illustrated by the facts in the underlying litigation in this action.

In order to meet its burden of proof under *McKay*, WEBER will have to prove that HOOVER's parachute assembly conformed to an approved specification at the time of HOOVER's injury, or that any non-conformity was due to Air Force error in servicing the assembly. The last person to service and reassemble HOOVER's parachute assembly was DICKSON, whose statement about what he did or did not do is the subject of the petition. Thus, DICKSON's statement is crucial to WEBER's defense, and its suppression under Exemption 5 could gravely injure WEBER.

D. The Decision Below Is Consistent With the Intent of Congress That Facts Concerning Aircraft Accidents Be Publicly Disclosed.

As has been previously discussed, 49 U.S.C. § 1441 requires that the NTSB publicly report the facts it receives during its investigations. A similar requirement is imposed

on the military by 49 U.S.C. § 1442(c):

> (c) With respect to . . . accidents involving solely military aircraft, the military authorities *shall provide* the Administrator and the National Transportation Safety Board with *any information* with respect thereto which, in the judgment of the military authorities, would contribute to the promotion of air safety. [Emphasis added.]

Congress has thus mandated the disclosure by the government to the FAA and NTSB of *any* information it gathers during the investigation of a military aircraft accident that could promote air safety, including, presumably, witness statements which would be subject to the promise of confidentiality at issue here. When coupled with the disclosure requirements of 49 U.S.C. § 1441, the Congressional intent that this information be disclosed is clear. In any event, these statutes are inconsistent with the government's argument here that Congress specifically intended that such statements be completely exempt from disclosure.

CONCLUSION.

In summary, the petition is based on an implicit assumption of confidentiality which is not supported by the record. The alleged injury to the government's ability to investigate military aircraft accidents is not supported by the record, and is highly suspect. This Court has already resolved the legal issue raised in *Merrill*, and the court below properly applied *Merrill*. Finally, the decision below will promote a fundamental goal of the legal system by promoting the determination of truth, and by preventing gross inequity.

For these reasons, WEBER respectfully urges this Court to deny the petition or, if this Court is inclined to grant the petition, to summarily affirm the decision below.

Respectfully submitted,

JACQUES E. SOIRET,
MARSHALL SILBERBERG,
ROBERT M. CHURELLA,
KIRTLAND & PACKARD,
Attorneys for Plaintiff-Respondent,
Weber Aircraft Corporation.

APPENDIX A.

Order.

In the United States Court of Appeals for the Ninth Circuit.

Weber Aircraft Corporation, a division of Walter Kidde and Company, Inc., and Mills Manufacturing Corporation, a corporation, Plaintiffs-Appellants, v. United States of America, Defendant-Appellee. No. 80-5744.

Filed, Nov. 5, 1981.

Before: CANBY and NORRIS, Circuit Judges, and SMITH,* Senior District Judge.

The Government is invited to submit a brief memorandum on or before November 18, 1981 directed to the following points:

1. a response to the point made by appellants at oral argument that AFR 127-4, requiring that witnesses be advised of the confidentiality of statements made by them to the Accident Investigation Board, did not take effect until after the investigation in this case; the response to include the effect of predecessor regulations, if any; and

2. a reference to parts of the record, if any, indicating whether promises of confidentiality were made to the witnesses whose statements are sought in this case.

Appellants may submit a brief written response to the Government memorandum on or before November 25, 1981.

---

*Of the District of Montana.

APPENDIX B.

Appellee's Supplemental Memorandum.

United States Court of Appeals for the Ninth Circuit.

Weber Aircraft Corporation, a division of Walter Kidde and Company, Inc., and Mills Manufacturing Corporation, a Corporation, Plaintiffs/Appellants, v. United States of America, Defendant/Appellee. No. CA 80-5744, D.C. #CV 79-2883-WPG.

At oral argument herein on November 5, 1981, attorney Lawrence J. Galardi raised an issue for appellants apparently not mentioned in their briefs. Upon oral application of appellee's counsel, by Order filed November 5, 1981, the Court therefore invited appellee "to submit a brief memorandum on or before November 18, 1981 directed to the following points:

"1. a response to the point made by appellants at oral argument that AFR 127-4, requiring that witnesses be advised of the confidentiality of statements made by them to the Accident Investigation Board, did not take effect until after the investigation in this case; the response to include the effect of predecessor regulations, if any; and

"2. a reference to parts of the record, if any, indicating whether promises of confidentiality were made to the witnesses whose statements are sought in this case."

This is appellee's memorandum, so authorized.

There was an AFR 127-4 *dated 1 January 1973* in effect during the safety investigation which was conducted following the subject air crash of October 9, 1973. This version of the AFR, incorporated in appellee's Motion for Summary Judgment as pages 28-95 (C.R. 10), provides, at least implicity, that witnesses are to be advised of the confiden-

tiality of statements made to the Accident Investigation Board.

> "Witnesses will be advised before they testify that the sole purpose of the investigation is to determine all factors relating to the accident/incident and in the interest of accident prevention, to preclude recurrence." C.R. 10, page 38.

The witness statements are to be incorporated in, or attached to, reports "prepared by, for, or at the direction of the Inspector General, USAF . . . (which) are, therefore privileged documents." C.R. 10, page 42. The same page of the 1 January 1973 regulation continues:

> "(1) Reports and investigations . . . made under this regulation will be used only within the USAF to determine all factors contributing to the mishap for the sole purpose of taking corrective action in the interest of accident prevention (see paragraph 20).
>
> "(2) These reports and their attachments will not be used as evidence nor to obtain evidence for disciplinary action; as evidence in determining the misconduct or line-of-duty status of any personnel; as evidence before flying evaluation boards; as evidence to determine pecunairy liability; or, except as stated in (4) below, as evidence to determine liability in claims against the US Government.
>
> "(3) These reports and their attachments will not be released to the Department of Justice, any United States attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except as stated in (4) below. . . ."

Independently of the 1 January 1973 regulation, there is ample evidence of record that express promises of confidentiality were made to the witnesses whose statements are

sought in this case. The Air Force Judge Adovcate General averred that under the regulation "complete assurance is given to any witness testifying or otherwise producing evidence that such testimony or evidence cannot be used in any other legal or administrative proceeding." C.R. 10, page 20. The Commander of the Air Force Inspection and Safety Center declared:

> "Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety *and will not be disclosed outside the Air Force*. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussions concerning all the circumstances surrounding an accident. . . . I firmly believe that a promise given by the United States Air Force in good faith should be no less honored than a promise given by any other agency of the United States of America." C.R. 10, page 16, emphasis added.

The policy of the AFR "has been in effect for over twenty-five years." C.R. 10, page 14.

With reference to an accident occurring in the year before the subject Hoover incident, and a safety investigation conducted "shortly after" that crash, the Eighth Circuit, on a record made before the United States District Court for the Northern District of Iowa, found that each safety investigation witness receives "the assurance that the information he imparts to the safety board will be kept confidential and will not be . . . used for any purpose other than accident prevention." *Brockway v. Department of Air Force*, 518 F.2d 1184, 1186 (1975).

The potential for confusion was engendered when appellee placed in evidence below not only the regulation effective 1 January 1973, but also its successor regulation

effective 16 January 1978. One supposes that the later regulation was thought pertinent because, at C.R. 10, page 216, it provides a Witness Statement Format, useful in assuring that each potential witness has been fully advised of the confidentiality which has always been accorded to a safety investigation statement. Appellee sincerely regrets its mistaken reference at footnote 2, page 3 of its brief, to the 1978 regulation, which compounded the confusion.

It has been demonstrated that a pertinent version of AFR 127-4 was in effect during the safety investigation in this case; that the record shows that promises of confidentiality were made to the witnesses whose statements are sought by appellants; and, that the Findings of the District Court (C.R. 21, see particularly p. 3) are therefore correct and supported by the evidence.

DATED: At Los Angeles, California this 16th day of November, 1981.

Respectfully submitted,

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
VOLNEY V. BROWN, JR.
Assistant United States Attorney
Attorneys for Defendant/Appellee

APPENDIX C.

Air Force Regulation 127-4, 1 January 1973.

12. Witnesses. The appearance of witnesses before an investigator or board appointed to investigate an Air Force accident/incident will be governed by the following:

a. The use of truth serums, hypnotic techniques/drugs, or polygraph tests is prohibited in any USAF accident investigation or inquiry.

b. Witnesses will not testify under oath and will not be sworn.

c. Witnesses will be advised before they testify that the sole purpose of the investigation is to determine all factors relating to the accident/incident and in the interest of accident prevention, to preclude recurrence.